UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS P. ANDERSON, **Plaintiff,** **-against-** **SOTHEBY'S, INC. SEVERANCE PLAN, et al.,** **Defendants.**	**Civil Action No. 04cv08180 (SAS)** **ELECTRONICALLY FILED**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

NATURE OF ACTION 1

STANDARD OF REVIEW 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE COMMITTEE'S COMPARABILITY DETERMINATIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE 5

A. Substantial Evidence Supports the Determination That Cendant Offered Anderson A Job With Defined Responsibilities and Compensation 5

B. Substantial Evidence Supports the Determination That Cendant Offered Anderson A Position With Comparable Responsibilities and Authority 6

C. Substantial Evidence Supports the Determination That Cendant Offered Anderson Comparable Compensation 10

II. ANDERSON'S CLAIM THAT THE COMMITTEE'S DETERMINATIONS WERE ERRONEOUS "AS A MATTER OF LAW" LACKS MERIT 11

III. THE COMMITTEE COMPLIED WITH ERISA'S PROCEDURAL REQUIREMENTS 12

A. The Committee Provided Anderson with a Full and Fair Review of his Benefit Claim 12

B. The Committee Informed Anderson of the Evidence Necessary to Perfect His Benefit Claim 16

C. The Committee Followed the Plan's Written Claim Procedures 17

IV. SUMMARY JUDGMENT SHOULD BE ENTERED FOR DEFENDANTS AND AGAINST ANDERSON ON THE "UNPAID WAGES" CLAIM 18

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Alternative Care Sys. v. Metro. Life Ins. Co., No. 92 Civ. 7208 (RPP), 1996 WL 67737 (S.D.N.Y. Feb. 16,1996) 13

Anderson v. Sotheby's, Inc. Severance Plan, No. 04 Civ. 8180 (SAS), 2005 WL 2583715 (S.D.N.Y. Oct. 11, 2005) 2, 3

Awbrey v. Pennzoil Co., 961 F.2d 928 (10th Cir. 1992)....................9

Belvidere Home Infusion Services, Inc. v. Guardian Life Insurance Co., No. 94 CV 0778 (EHN), 1996 WL 524402 (E.D.N.Y. Sept. 6, 1996)....................13

Bogue v. Ampex Corp., 976 F.2d 1319 (9th Cir. 1992) 9

Burke v. Kodak Retirement Income Plan, 336 F.3d 103 (2d Cir. 2003)....................13

Cook v. N.Y. Times Co. Long-Term Disability Plan, No. 02 Civ. 9154 (GEL), 2004 WL 203111 (S.D.N.Y. Jan. 30, 2004)....................13, 17

Criscuolo v. Joseph E. Seagram & Sons, Inc., No. 02 Civ. 1302 (GEL), 2003 WL 22415753 (S.D.N.Y. Oct. 31, 2003) 20

Dabertin v. HCR Manor Care, Inc., 373 F.3d 822 (7th Cir. 2004) 11

Digregorio v. Hartford Comprehensive Employee Benefit Serv. Co., 423 F.3d 6 (1st Cir. 2005) 14

Freiberg v. First Union Bank, No. Civ. A. 99-571-JJF, 2001 WL 826549 (D. Del. July 18, 2001)....................12

Fuller v. J.P. Morgan Chase & Co., 423 F.3d 104 (2d Cir. 2005)....................2

Girlado v. Build. Serv. 32B-J Pension Fund, No. 04-CV-3595 (GBD), 2006 WL 380455 (S.D.N.Y. Feb. 16, 2006)....................13

Goldstein v. Johnson & Johnson, No. 96-CV-5643, 2000 WL 33582646 (D.N.J. Feb. 14, 2000) 16

Goodman v. S & A Restaurant Corp., 821 F. Supp. 1139 (S.D. Miss. 1993)....................4

Grossmuller v. International Union, 715 F.2d 853 (3d Cir. 1983)....................15

Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988) 16

Jez v. Dow Chemical Co., Inc., 402 F. Supp. 2d 783 (S.D. Tex. 2005)....................................3

Liston v. UNUM Corp., 330 F.3d 19 (1st Cir. 2003)....................................9

Macri v. Aetna U.S. Healthcare, No. CV-03-3860 (CPS), 2005 WL 1475416 (E.D.N.Y. June 20, 2005)....................................13

Mario v. P & C Food Markets, Inc., 313 F.3d 758 (2d Cir. 2002)....................................4

Miller v. United Welfare Fund, 72 F.3d 1066 (2d Cir. 1995)....................................3, 14

Nichols v. Prudential Insurance Co., 406 F.3d 98 (2d Cir. 2005)....................................13

O'Dell v. Trans World Entertainment Corp., 153 F. Supp. 2d 378 (S.D.N.Y. 2001)....................................19

Occidental Engineering Co. v. INS, 753 F.2d 766 (9th Cir. 1985)....................................4

Ohanian v. Avis Rent A Car System, Inc., 779 F.2d 101 (2d Cir. 1985)....................................6

Orndorf v. Paul Revere Life Insurance Co., 404 F.3d 510 (1st Cir. 2005)....................................4

Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975 (7th Cir. 1999)....................................3

Reilly v. Natwest Markets Group Inc., 181 F.3d 253 (2d Cir. 1999)....................................19

Ressler v. Aetna U.S. Healthcare, Inc., 180 F. Supp. 2d 660 (E.D. Pa. 2001)....................................12

Schneider v. Sentry Group Long Term Disability Plan, 422 F.3d 621 (7th Cir. 2005)....................................13

Skretvedt v. E.I. DuPont de Nemours and Co., 268 F.3d 167 (3d Cir. 2001)....................................16

Winkler v. Metro. Life Ins. Co., No. 03 Civ. 9656 (SAS), 2005 WL 911862 (S.D.N.Y. Apr. 18, 2005)....................................3, 13

Yochum v. Barnett Banks, Inc. Severance Pay Plan, 234 F.3d 541 (11th Cir. 2000)....................................12

Zervos v. Verizon N.Y., Inc, 277 F.3d 635 (2d Cir. 2001)....................................3

STATE CASES

Dean Witter Reynolds Inc. v. Ross, 75 A.D.2d 373 (N.Y. Sup. Ct. 1980)....................................19

Hall v. United Parcel Serv. of America, Inc., 76 N.Y.2d 27 (1990)....................................19

Truelove v. N.E. Capital & Advisory, Inc., 95 N.Y.S.2d 220 (App. Div. 2000) 19

FEDERAL STATUTES AND REGULATIONS

ERISA § 503(2), 29 U.S.C. § 1133(2)..12

29 C.F.R. § 2560.503-1...16, 17

NATURE OF ACTION

This is a challenge to an ERISA plan administrator's determination that a plan participant is ineligible for severance benefits. The administrator denied the participant's claim because it determined that his job responsibilities and compensation under a new employer were comparable to his job responsibilities and compensation under a previous employer. The participant challenges the administrator's determination as arbitrary and capricious.

Until February 17, 2004, Sotheby's International Realty, Inc. ("SIR") was a subsidiary of Sotheby's Holdings, Inc. ("Sotheby's"). On February 17, 2004, Sotheby's sold SIR to Cendant Corporation ("Cendant"). At the time of the sale, Plaintiff Thomas B. Anderson was employed by SIR as an Executive Vice President and Regional Manager. He earned $815,000 in salary and incentive bonus at Sotheby's in 2002 and a similar amount in 2003. Cendant continued to employ Anderson after the sale. On March 14, 2004, while Cendant was trying to finalize a package that would meet Anderson's specifications, Anderson broke off the discussions and gave the company notice that he would end his employment on March 31, 2004.

Under the Sotheby's, Inc. Severance Plan ("Plan"), Anderson was eligible for severance benefits if Cendant failed to offer him a position comparable in responsibilities and compensation to his position at SIR. On serving notice of his resignation, Anderson filed a claim for severance benefits with Sotheby's Severance Committee ("Committee"), which is responsible for determining claims for such benefits under the Plan. Anderson contended that Cendant had not offered him a comparable position.

The Committee denied Anderson's claim on July 16, 2004 and his appeal from that denial on September 20, 2004. The Committee determined that Cendant had offered Anderson, and Anderson had declined to accept, a position comparable in responsibility to his position at SIR and guaranteed him an income over the next two years – not including bonuses – that would have exceeded his total compensation – salary and bonus – in the same period had SIR not been sold. In reaching its determination, the Committee considered all relevant documents, including Anderson's submissions, and interviewed knowledgeable Cendant and Sotheby's executives. The Committee met at length six times to consider Anderson's claim and appeal. It explained its determination in an 11-page, single-spaced letter denying Anderson's claim, and it addressed Anderson's objections to its determination in a 19-page, single-spaced letter denying his appeal.

On October 18, 2004, Anderson filed this action under ERISA challenging the Committee's denial of his claim for severance benefits on substantive and procedural grounds. He also included a claim for "unpaid wages" under New York law, representing the amount of a bonus to which he asserts he is entitled for his work from January 1, 2004 to February 17, 2004. Anderson has now moved for summary judgment. Sotheby's hereby cross-moves for summary judgment and asks that Anderson's motion be denied.

STANDARD OF REVIEW

Because the Plan gives the Administrator discretion to determine eligibility for benefits, the Administrator's denial of Anderson's claim is subject to review under an arbitrary and capricious standard. *Anderson v. Sotheby's, Inc. Severance Plan*, No. 04 Civ. 8180 (SAS), 2005 WL 2583715, at *3 n.29 (S.D.N.Y. Oct. 11, 2005). "Under this highly deferential standard of review, this Court cannot substitute its judgment for that of the Plan Administrator and will not overturn a decision to deny or terminate benefits unless it was without reason, unsupported by substantial evidence or erroneous as a matter of law." *Fuller v. J.P. Morgan Chase & Co.*, 423 F.3d 104, 106-07 (2d Cir. 2005) (citations and internal quotation marks omitted). "Substantial evidence means 'such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the decision maker.'" *Winkler v. Metro. Life Ins. Co.*, No. 03 Civ. 9656 (SAS), 2005 WL 911862, at *6 (S.D.N.Y. Apr. 18, 2005) (citation omitted).

Moreover, where review is under an arbitrary and capricious standard, "the only evidence [a district court] can consider is that contained in the administrative record." *Anderson v. Sotheby's, Inc. Severance Plan*, No. 04 Civ. 8180(SAS), 2005 WL 2583715, at *5 (S.D.N.Y. Oct. 11, 2005). Accordingly, this Court denied a motion by Anderson to admit evidence outside the administrative record and admonished him that "evidence outside of the administrative record will not be considered." *Id.* at *1.[1]

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[1] In spite of this Court's admonition, Anderson relies on evidence outside the administrative record in support of his ERISA claim, in particular, deposition testimony of Susan Alexander, the Chair of the Severance Committee. *See* Pl.'s Mot. Summ. J., Judish Decl., Ex. C (dkt. no. 41); Pl.'s Mem. Supp. Summ. J., at 5-6, 10-11, 20-21 (dkt. no. 42); Pl.'s Local R. 56.1 Statement, ¶¶ 21, 35-38, 45, 64 (dkt. no. 43). Anderson maintains that *Zervos v. Verizon N.Y., Inc*, 277 F.3d 635 (2d Cir. 2001), permits him to rely on this testimony because, he asserts, the testimony merely "describes" the record. *See* Pl.'s Mem. at 11 n.4 (citing *Zervos*, 277 F.3d at 647). Anderson, however, relies on the Alexander testimony for its evidentiary value as a supposed admission that one of the Committee's determinations rested on unsupported assumptions. *See id.* at 10-11. To accept Anderson's contention that the Court may consider this testimony because it merely "describes" the record would recognize an exception that would swallow the rule that "evidence outside the record . . . is not admissible to show that the administrator's decision was unreasonable or incorrect." *Jez v. Dow Chem. Co., Inc.*, 402 F. Supp. 2d 783, 786 (S.D. Tex. 2005). "[W]hen there can be no doubt that the application [for benefits] was given a genuine evaluation, judicial review is limited to the evidence that was submitted in support of the application for benefits, and the mental processes of the plan's administrator are not legitimate grounds of inquiry any more than they would be if the decisionmaker were an administrative agency." *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 982 (7th Cir. 1999). Whatever the Second Circuit meant in *Zervos* in stating that it would review the administrative record "as described by" the testimony of Dr. Wolinsky, its conclusion that the plan administrator applied the wrong standard and disregarded relevant evidence did not, in any event, depend on the extra-record testimony. Similarly, in *Miller v. United Welfare Fund*, 72 F.3d 1066 (2d Cir. 1995), the Second Circuit discussed extra-record testimony, but it did so only to answer a hypothetical question. *See id.* at 1072.

Ordinarily, "[s]ummary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)." *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 763 (2d Cir. 2002) (citation omitted). However, "[w]here review is properly confined to the administrative record before the ERISA plan administrator, . . . there are no disputed issues of fact for the court to resolve." *Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 518 (1st Cir. 2005). In that circumstance, the function of the district court on summary judgment "is to determine whether or not as a matter of law the evidence in the administrative record permitted the [plan administrator] to make the decision [she] did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985); *see also Goodman v. S & A Rest. Corp.*, 821 F. Supp. 1139, 1143-44 (S.D. Miss. 1993) (discussing function of court).

SUMMARY OF ARGUMENT

Substantial evidence supports the Committee's determination that Cendant offered a position comparable in responsibility and compensation to Anderson's position before the sale. The Committee could not have been more thorough in gathering information on which to make a determination or more deliberate in making its determination. In the course of considering Anderson's claim, the Committee met several times, considered all relevant documents, and took the initiative to meet with knowledgeable Cendant and Sotheby's executives to familiarize itself with Anderson's post-sale and pre-sale positions. The Committee explained its determination in a detailed 11-page, single-spaced claim denial letter and addressed Anderson's objections to its determination in a detailed 19-page, single-spaced appeal denial letter. Anderson, moreover, at all times employed the services of experienced, sophisticated counsel. Anderson disagrees with the Committee's assessment of the evidence, but he does not show that the Committee acted arbitrarily and capriciously. There is no reason for this Court to duplicate the Committee's role.

The record is also clear that, in reaching its determination, the Committee complied with the applicable procedural requirements. Finally, Anderson's claim for "unpaid wages" for 2004 under New York law lacks merit. Anderson was not guaranteed a bonus under a Sotheby's bonus plan, and any 2004 bonus that Anderson might have earned would have vested only at the end of 2004, long after his employment with Sotheby's ended.

ARGUMENT

I. THE COMMITTEE'S COMPARABILITY DETERMINATIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Substantial Evidence Supports the Determination That Cendant Offered Anderson A Job With Defined Responsibilities and Compensation

The Committee first determined that Cendant had offered Anderson a position with specific and defined authority, responsibility and compensation.[2] This determination is well supported by evidence in the administrative record.

The Committee found that between February 17, 2004 and March 31, 2004, Anderson met on several occasions with Michael Good, the new President and CEO of Cendant's SIR Affiliates division, and that Good offered Anderson a position with defined responsibility and compensation.[3] Good provided representatives of the Committee with a detailed description of the job responsibilities that he offered Anderson in these meetings,[4] and other Cendant executives confirmed that Anderson "was provided with a verbal offer of employment."[5] The Committee also found that Cendant, through Good, provided Anderson with a detailed, written compensa-

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2 Defs.' Local R. 56.1 Stmt. ("Stmt.") ¶¶ 35, 46-47.

3 Stmt. ¶¶ 35; Pl.'s Mot. Summ. J., Judish Decl. Ex. B, at TBA02071.

4 Judish Decl. Ex. B, at TBA02071-72; Stmt. ¶¶ 27-28.

5 Stmt. ¶ 19.

tion offer, which included multiple compensation opportunities tied to Anderson's performance of clearly-defined responsibilities. Stmt. ¶¶ 37, 47. Under New York law oral at-will employment agreements are valid and enforceable. *Ohanian v. Avis Rent A Car Sys., Inc.*, 779 F. 2d 101, 105-07 (2d Cir. 1985). The Committee reasonably determined that Cendant had extended to Anderson a valid offer of employment. Anderson's contention that there is "[n]o evidence in the record" to support the Committee's determination in this regard (Pl.'s Mem. at 5) is mystifying.

Anderson insists that the Committee should have credited his own statements supporting his benefit claim, *id.*, but Good contradicted Anderson's version of events, and the Committee's role is to decide which version of events to credit. Anderson also insists that certain statements by Good, Alexander, and Cendant confirm that Cendant made "no specific proposal" regarding his future employment. *Id.* at 5-6. But the Committee considered these statements and reasonably concluded otherwise.[6] The Committee's determination that Cendant offered Anderson a position with defined responsibilities and compensation was neither arbitrary nor capricious.

B. Substantial Evidence Supports the Determination That Cendant Offered Anderson A Position With Comparable Responsibilities and Authority

The Committee next determined that Cendant offered Anderson a position with responsibilities and authority comparable to Anderson's position at Sotheby's. Stmt. ¶¶ 36, 47. In making this determination, the Committee considered the relationship between Sotheby's "affiliate" business model and Cendant's "franchise" business model, *id.*; Anderson's job responsibilities under the Sotheby's and Cendant models, *id.*; and Anderson's authority under each model, *id.*. To understand Anderson's responsibilities and authority with each of the companies, the Committee, through representatives, met with Stuart Siegel, Anderson's superior at Sotheby's and, at Cendant, Good and Maria Perez-Brau, Cendant's Vice President for Human Resources.[7]

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[6] Judish Dec., Ex. A at A0216. The cited statements relate primarily to Cendant's compensation proposal, *id.*, Ex. B at TBA02071; *id.* Ex. C at 165-69, and the Cendant statement actually *confirms* that Cendant presented Anderson with a verbal offer of employment, Stmt. p 19.

The Committee concluded that the sale to SIR would have little impact on Anderson's responsibilities and authority. Both before and after the sale, he was responsible for managing a network of brokerages in the Tri-State (New York) and Mid-Atlantic regions that specialized in luxury residential properties and were permitted to use the SIR name. Stmt. ¶¶ 24, 26-27, 36, 47. In the position offered to him in the new organization, he would have continued to report directly to the president of the organization (Siegel before the sale, and Good afterwards); he would have continued to be responsible for managing the relationships with the brokerages in the two regions; and he would have continued to provide these brokerages with the same services in connection with the listing, marketing and sale of luxury residential properties. *Id.* Although Cendant planned to change, over time, the relationships with the brokerages from affiliate agreements to franchise agreements, Anderson would have continued to be responsible for managing the relationships with the brokerages, which included ensuring that they understood the value of the Sotheby's name and the services provided by SIR. Stmt. ¶¶ 28, 36, 47. Based on these considerations and conclusions, the Committee reasonably determined that "Anderson's responsibilities and authority at Cendant were and would have continued to be comparable to those that he enjoyed prior to February 17, 2004." Stmt. ¶ 36; *see also* Judish Decl., Ex. A at A0210.

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[7] Stmt. ¶¶ 22-30; Judish Decl. Ex. B, at TBA02066-69 (Siegel meeting); *id.* Ex. B, at TBA02070-72 (Good and Perez-Brau meeting).

Anderson asserts that the Committee's comparability decision is arbitrary because two of Anderson's primary roles with Sotheby's – traditional selling and advice regarding specific properties – were "entirely absent" from the Committee's description of his Cendant responsibilities. Pl.'s Mem. at 8. Contrary to Anderson's assertion, however, the Committee's initial denial letter explained that Cendant asked Anderson "to provide the same type of listing and realtor services that he had provided" prior to February 17, 2004. Stmt. ¶ 36. That letter further explained that under the Cendant model, there was "no reason why Mr. Anderson could not select specific properties with which to become personally involved, either in performing listing services or realtor services for the buyer." *Id.*; see also Judish Decl., Ex. A at A0209. Good and Perez-Brau emphasized to the Committee that Anderson "would [have been] available to consult on how to market specific properties" and "could have continued to do all the realtor services he wanted" in his Cendant position, and that listing services were "anticipated as a key role in [Anderson's] job" with Cendant. Stmt. ¶ 27.

In asserting that the evidence before the Committee "did not support its finding of comparable duties," Anderson disputes the Committee's determination that a position requiring franchise conversion and management *can* be comparable to his affiliate management role at Sotheby's. Pl.'s Mem. at 8. The Committee's determination, however, is supported by Good and Perez-Brau, who stressed the similarity of the affiliate and franchise management roles, explaining that "Anderson would be working with the same brokers that he knew," would maintain "the same relationships," and would perform responsibilities comparable to those stated in Anderson's own declaration of his Sotheby's role. Stmt. ¶ 27. Good also explained that until Anderson's affiliate brokers converted to franchises (a process that could take nearly two years), Anderson's continuing affiliate management responsibilities would entail the "same autonomy and responsibility" as with Sotheby's. Stmt. ¶ 24.

Finally, Anderson faults the Committee for not inquiring further about statements allegedly made by Siegel and Good that Anderson's position would differ considerably from his Sotheby's employment. Pl.'s Mem. at 8-9. The Committee, however, did ask Good about these alleged statements, and Good denied ever having "said anything discouraging to Anderson."[8] Moreover, Siegel never raised the issue of Anderson's future role in is meeting with the Committee's representatives. Stmt. ¶ 29. It was not unreasonable for the Committee to credit Good and Siegel's recollection of their statements over Anderson's self-serving hearsay representations and give little weight to Anderson's second-hand recitation of the purported admissions of other Cendant executives. Stmt. ¶¶ 44, 47. The Committee stated that it "found no reason to question the credibility of the statements made by the Cendant executives." *Id.*

That there may be minor distinctions between affiliate and franchise management does not render the Committee's comparability determination arbitrary and capricious. The Plan required Cendant to offer Anderson a "comparable" position, not an "identical" one. *See Liston v. UNUM Corp.*, 330 F.3d 19, 25 (1st Cir. 2003) (affirming plan administrator's determination that positions requiring "similar skills and abilities" were "comparable" for purposes of severance plan); *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 931 (10th Cir. 1992) (agreeing that "'comparable' does not mean 'identical'" for purposes of severance plan). Indeed, courts have upheld determinations that positions with significantly greater differences in responsibility and authority are "comparable" under similar severance plans. *See Bogue v. Ampex Corp.*, 976 F.2d 1319, 1326

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8 Judish Decl. Ex. B, at TBA02071.

(9th Cir. 1992) ("The difference between [claimant's] pre-acquisition and post-reorganization jobs are in some practical respects great, but they involve comparable levels of responsibility within the corporation. [The plan administrator] did not abuse its discretion in finding the two jobs substantially equivalent.").

C. Substantial Evidence Supports the Determination That Cendant Offered Anderson Comparable Compensation

The Committee also reasonably concluded that Cendant offered Anderson a position with comparable compensation. Stmt. ¶¶ 37, 46-47. Anderson complains that Cendant's compensation proposal was not sufficiently defined for the Committee to make a reasoned comparison to his Sotheby's compensation, Pl.'s Mem. at 10; that the record provides no evidentiary basis for the Committee's comparison, *id.* at 10-11; and that the Committee arbitrarily compared his average annual Sotheby's compensation to the "singular, unmatched high water mark" in Cendant's compensation proposal, *id.* at 11-12. Anderson's complaints, which the Committee considered and rejected in Anderson's appeal, lack merit.

The administrative record contains substantial evidence supporting the Committee's comparability determination. Under each year of the Cendant proposal, Anderson's *guaranteed* compensation would have greatly exceeded his guaranteed compensation from Sotheby's. Stmt. ¶ 37; *see also* Judish Decl., Ex. A at A0053, A0099. Including base salary and a guaranteed bonus, Cendant guaranteed Anderson a minimum compensation of $450,000 per year in 2004 and 2005, and $420,000 per year between 2006 and 2008. Stmt. ¶ 37; *see also* Judish Decl., Ex. A at A0053, A0099. Cendant's proposal also guaranteed Anderson an annual Long Term Incentive Plan award of $200,000, vesting over a four-year period at a rate of $50,000 per year. Stmt. ¶ 37; *see also* Judish Decl., Ex. A at A0054, A0099. Additionally, Cendant guaranteed Anderson a $800,000 retention bonus, payable if he was employed by Cendant on December 31, 2005. Stmt. ¶ 37; *see also* Judish Decl., Ex. A at A0054, A0099.

Indeed, evidence in the record indicates that Cendant offered Anderson's *potential* compensation under its five-year proposal that exceeded Anderson's average annual Sotheby's compensation. Stmt. ¶ 37; *see also* Judish Decl., Ex. A at A0099. Not only did Anderson's guaranteed compensation in each year of the Cendant proposal substantially exceed his guaranteed Sotheby's compensation, Stmt. ¶ 37; his guaranteed compensation in *the first two years* of the Cendant proposal surpassed the total salary *plus* bonus that Anderson earned during his final two years at Sotheby's. Stmt. ¶¶ 15, 37.

In short, substantial evidence supports the Committee's determination that Cendant offered Anderson comparable compensation.

II. ANDERSON'S CLAIM THAT THE COMMITTEE'S DETERMINATIONS WERE ERRONEOUS "AS A MATTER OF LAW" LACKS MERIT

Anderson asserts that the Committee's determination that Cendant offered a comparable position is inconsistent with "substantial case law," Pl.'s Mem. at 20, and therefore "erroneous as a matter of law." Each cited case, however, is distinguishable. Moreover, the appellate decisions are not from the Second Circuit, and the district court decisions (one of which is unreported) are not binding authority even within their own circuits.

In *Dabertin v. HCR Manor Care, Inc.*, 373 F.3d 822 (7th Cir. 2004), the Seventh Circuit held that a claimant suffered a "significant reduction" in the scope of her authority when her employer halved her responsibility for regional operations, reduced her management function, and eliminated her budgetary authority. The position that Cendant offered Anderson at Cendant did not reduce his authority and was comparable, if not superior, to Anderson's prior position with Sotheby's. *See supra* at 6-10.

In *Yochum v. Barnett Banks, Inc. Severance Pay Plan*, 234 F.3d 541 (11th Cir. 2000), the plan in question provided for severance benefits unless a participant declined "comparable employment." The Eleventh Circuit rejected, as arbitrary and capricious, a plan administrator's conclusion that a two-year salary proposal, under which the claimant's compensation would remain unchanged in the first year but decline by seventy-five percent in the second year, satisfied the comparability requirement. Similarly, in *Freiberg v. First Union Bank*, No. Civ. A. 99-571-JJF, 2001 WL 826549 (D. Del. July 18, 2001), the district court overturned, as arbitrary and capricious, a plan administrator's determination of comparability with respect to compensation where the claimant was offered a position with initially equivalent compensation but a guaranteed reduction of the claimants' compensation within six months. Here, evidence in the record supports the Committee's determination that Cendant proposed to compensate Anderson, going forward, at least as generously as Sotheby's had done. *See supra* at 10-11.

In *Ressler v. Aetna U.S. Healthcare, Inc.*, 180 F. Supp. 2d 660 (E.D. Pa. 2001), the district court held it arbitrary and capricious for a plan administrator to find a job offer "comparable" where the offer provided *no* detail concerning the terms and conditions of the position and the administrator therefore had no basis for determining comparability. Here, evidence in the record provided sufficient detail for the Committee to make the comparability determination. *See supra* at 6-11.

III. THE COMMITTEE COMPLIED WITH ERISA'S PROCEDURAL REQUIREMENTS

A. The Committee Provided Anderson with a Full and Fair Review of his Benefit Claim

ERISA § 503(2), 29 U.S.C. § 1133(2), requires plan fiduciaries to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review" of the initial decision denying the participant's benefit claim. The "core requirements" of full and fair review serve to ensure that participants "know[] what evidence the decision-maker relied upon," that participants "hav[e] an opportunity to address the accuracy and reliability of that evidence," and that "decision-maker[s] consider the evidence presented by both parties prior to reaching and rendering [a] decision." *Cook v. N.Y. Times Co. Long-Term Disability Plan*, No. 02 Civ. 9154 (GEL), 2004 WL 203111, at *6 (S.D.N.Y. Jan. 30, 2004) (citation omitted).

Although the Second Circuit has not squarely addressed the issue, district courts in this Circuit have held that a plan fiduciary satisfies ERISA § 503(2) if her actions "substantially comply" with the spirit of its requirements, *see*, *e.g.*, *Girlado v. Build. Serv. 32B-J Pension Fund*, No. 04-CV-3595 (GBD), 2006 WL 380455, at *3 (S.D.N.Y. Feb. 16, 2006).[9] A plan fiduciary substantially complies with Section 503(2) when she supplies a claimant with "with a statement of reasons that, under the circumstances of the case, permit[s] a sufficiently clear understanding of the administrator's position to permit effective review." *Schneider v. Sentry Group Long Term Disability Plan*, 422 F.3d 621, 628 (7th Cir. 2005) (citation omitted).

Anderson reprises as a procedural complaint his contention that substantial evidence does not support the Committee's denial of his benefit claim. Pl.'s Mem. at 14. Anderson claims that he was "demonstrably prejudiced" because the Committee withheld evidence relevant to its initial denial of his benefit claim. *Id.* at 14-16. Specifically, Anderson asserts that the Committee

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9 *Accord Macri v. Aetna U.S. Healthcare*, No. CV-03-3860 (CPS), 2005 WL 1475416, at *6 (E.D.N.Y. June 20, 2005); *Winkler*, 2005 WL 911862, at *6; *Belvidere Home Infusion Servs., Inc. v. Guardian Life Ins. Co.*, No. 94 CV 0778 (EHN), 1996 WL 524402, at *6 (E.D.N.Y. Sept. 6, 1996); *Alternative Care Sys. v. Metro. Life Ins. Co.*, No. 92 Civ. 7208 (RPP), 1996 WL 67737, at *2-3 (S.D.N.Y. Feb. 16,1996). The Second Circuit appears to approve of the standard but has not yet adopted it. *See Nichols v. Prudential Ins. Co.*, 406 F.3d 98, 107 (2d Cir. 2005); *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003).

did not provide him with notes from the Committee's representatives' meetings with Siegel, Good, and Perez-Brau. *Id.* at 14-16. He describes an elaborate chain of causation whereby the Committee's "withholding" of the details of these meetings "deprived him of the opportunity to rebut that evidence" in his administrative appeal, thereby making the Committee's final decision arbitrary and capricious. *Id.* at 16.

The glove doesn't fit. The Committee's claim denial letter contains detailed descriptions of the Cendant and Sotheby's executives' statements relevant to Anderson's claim,[10] and the Committee's appeal denial letter reconsidered the statements in light of Anderson's subsequent submissions to the Committee. Stmt. ¶ 47. Because the initial denial letter provided Anderson with the exact substance of the statements on which the Committee relied, Anderson cannot now assert that he was unable to address or rebut these statements in his administrative appeal. *See, e.g.*, *Digregorio v. Hartford Comprehensive Employee Benefit Serv. Co.*, 423 F.3d 6, 15-17 (1st Cir. 2005) (denying Section 502(3) challenge where claimant could not demonstrate prejudice from administrator's failure to disclose complete claim file).[11]

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10 *See* Stmt. ¶ 38. *See also* Judish Decl., Ex. A at A0163 (describing meeting with Good and Perez-Brau regarding Anderson's responsibilities at Cendant); *id.*, Ex. A at A0163-64 (describing Siegel meeting regarding Anderson's responsibilities at Sotheby's); *id.*, Ex. A at A0165-67 (describing Good and Siegel meetings regarding Anderson's compensation at Cendant and Sotheby's).

11 Anderson also maintains that it was improper under *Miller v. United Welfare Fund*, 72 F.3d 1066, 1072 (2d Cir. 1995), for the Committee to rely on its representatives' oral summary of the meetings, and not on the written meeting notes. Pl.'s Mem. at 15. *Miller* held that is was arbitrary and capricious for plan fiduciaries deny a benefit claim based entirely on a "three-sentence report" that did not accurately reflect the administrative record. 72 F.3d at 1072. By contrast, the Committee based its determination on its direct review of the record, including its representatives' detailed accounts of their meetings with Cendant and Sotheby's executives. Stmt. ¶¶ 34, 38, 43-47. Moreover, *Miller* did not hold that plan fiduciaries may not rely on

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Anderson asserts that the Committee failed to consider evidence submitted in support of his administrative appeal. Pl.'s Mem. at 16-17. Anderson alleges that the Committee: (1) "refused" his suggestion to weigh the credibility of Cendant's executives; (2) "refused" to consider the prior benefit claim of George Ballantyne, another former Sotheby's employee; and (3) failed to consider either his September 13 and 16, 2004 submissions, or his May 28, 2004 submission regarding the Seventh Circuit's *Dabertin* decision. *Id.* Contrary to Anderson's assertions, the administrative record reveals that the Committee considered all of Anderson's substantive submissions. The minutes of the Committee's September 14, 2004 meeting and the appeal denial letter address the credibility of the Cendant and Sotheby's executives. Stmt. ¶¶ 44, 47. The appeal denial letter similarly addresses Anderson's suggestion regarding the relevance of George Ballantyne's benefit claim, Stmt. ¶ 47, and references the Committee's consideration of Anderson's May 28 and September 16, 2004 submissions. Stmt. ¶ 45.[12]

Finally, relying on *Grossmuller v. International Union*, 715 F.2d 853 (3d Cir. 1983), Anderson asserts that the Committee improperly failed to permit him to personally appear in support of his claim. Pl.'s Mem. at 16-17. In *Grossmuller*, the Third Circuit stated that if a plan fiduciary "allows third parties to appear personally, the same privilege must be extended to the participant." 715 F.2d. at 858. Because the Committee's representatives met with Siegel, Good,

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summarized information. In fact, *Miller* presumed that fiduciaries could rely on a proper summary of information in the administrative record. 72 F.3d at 1072.

[12] Moreover, neither Anderson's September 13, 2004 letter nor his September 16, 2004 letter present substantive arguments not previously communicated to the Committee. The September 13, 2004 letter addresses a document dispute and does not mention the substance of Anderson's benefit claim. Judish Decl., Ex. A at A0184-86. The September 16, 2004 letter reemphasizes prior arguments advanced by Anderson, while conceding that Anderson has "no further information to provide" to the Committee. Stmt. ¶ 41.

and Perez-Brau, Anderson contends that the Committee was also required to consider his personal testimony. But Anderson, although represented throughout the process by counsel, never requested a personal appearance before the Committee. He cannot now claim that the Committee acted arbitrarily in not affording him a purported privilege that he never sought to exercise. *See Goldstein v. Johnson & Johnson*, No. 96-CV-5643, 2000 WL 33582646 (D.N.J. Feb. 14, 2000) (denying ERISA procedural challenge where claimant "never asked for the opportunity to appear" before the plan fiduciary).

Moreover, the "privilege" described in *Grossmuller* exists only if the third party appears before the fiduciary as an advocate and "provide[s] factual information which the absent claimant cannot refute." *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 287 (3d Cir. 1988); *see also Skretvedt v. E.I. DuPont de Nemours and Co.*, 268 F.3d 167, 176 (3d Cir. 2001). The Cendant and Sotheby's executives did not meet with the Committee's representatives as advocates for the denial of Anderson's claim. Stmt. ¶¶ 22, 31. Moreover, the Committee's initial denial letter contained a detailed summary of substance of these executives' statements, Stmt. ¶ 38, enabling Anderson to refute this testimony in his subsequent submissions to the Committee.

B. The Committee Informed Anderson of the Evidence Necessary to Perfect His Benefit Claim

A claim denial letter must describe "any additional material or information necessary for the claimant to perfect his claim" and explain "why such material or information is necessary."[13] Anderson asserts that Committee's initial denial letter failed to inform him of the defects in his claim. Pl.'s Mem. at 18-20. Two of the three examples that Anderson cites, however, note his failure to respond to reasoning clearly set forth in the Committee's initial denial letter.[14] The third example, which notes that Anderson provided no support for his assertion that Good had "not disagreed" with him that Cendant did not offer him comparable employment, is simply a factual conclusion regarding the *weight* of Anderson's evidence.

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[13] 29 C.F.R. § 2560.503-1(g); *see also* Stmt. ¶ 9 ("The [denial] notice will also tell you what, if anything, you can do to have your claim approved.").

Cook, the only case cited by Anderson, found a procedural violation where a plan fiduciary's denial letter completely failed to describe any of the criteria by which the fiduciary determined the claimant's claim. 2004 WL 203111, at *11. By contrast, the Committee's 11-page claim denial letter clearly set forth both the criteria and evidence upon which the Committee relied. Stmt. ¶ 34.

C. The Committee Followed the Plan's Written Claim Procedures

Anderson asserts that the Committee failed to follow the Plan's written claim procedures by applying an "unidentified enhanced procedure" to consider his claim and maintains that he was never advised of this "enhanced procedure" in violation of 29 C.F.R. § 2560.503-1(b)(2). Pl.'s Mem. at 20. This assertion is also unfounded.

The Plan's Summary Plan Description sets forth the procedures for consideration of benefit claims. These procedures: (1) permit a participant to file a written benefit claim; (2) require the Committee to provide detailed written notice of a claim denial; (3) permit a participant to submit a written appeal of an initial claim denial; and (4) require the Committee, following appeal, to provide written notice of its final decision. Stmt. ¶ 9. The Committee complied with each step of this procedural framework.

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[14] Stmt. ¶ 36 (stating that Anderson's "responsibilities and authority remained identical in all respects to those he enjoyed prior to February 17"); *id.* ¶ 37 (setting forth the Committee's analysis of Cendant's proposed compensation model).

Acting within this framework, the Committee permissibly solicited additional information from Anderson and the Cendant executives to ensure that it "would be objective and fair and complete in discharging [its] duties."[15] Notably, the Committee also permissibly solicited additional information from Anderson supporting his claim.[16] Neither ERISA nor its implementing regulations prohibits plan fiduciaries acting within the limits of a written claim procedure from soliciting additional information to ensure fair consideration of a participant's benefit claim.

IV. SUMMARY JUDGMENT SHOULD BE ENTERED FOR DEFENDANTS AND AGAINST ANDERSON ON THE "UNPAID WAGES" CLAIM

Anderson claims that he is entitled to payment of "unpaid wages" representing a bonus to which he asserts he is entitled for his employment by Sotheby's between January 1 and February 17, 2004. Pl.'s Mem. at 22-25. Anderson cannot prevail on this claim under any of his theories.[17]

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15 Judish Decl. Ex. C, at 38-39. Defendants' cite Alexander's deposition testimony only to refute Anderson's reliance on that testimony. Defendant's reassert that this testimony is not part of the administrative record and not to be considered in support of Anderson's motion. *See supra*, at 3 n.1.

16 Judish Decl., Ex. A at A0039; *id.*, Ex. A at A0194-95. In this respect, Anderson's position appears to be that it is permissible for the Committee to request additional information from him regarding his claim, but that it is not permissible for the Committee to seek similar information from others knowledgeable about Anderson's Cendant and Sotheby's employment.

17 In the event that the Court were to conclude that Anderson is entitled to a bonus, the amount of such bonus is disputed. Anderson asserts that he should have received a bonus of $202,618.98 for his work during the first 48 days of 2004. *See* Pl.'s Mem. at 24 n.14. But if a partial-year bonus calculation is made, the proper basis is Sotheby's actual financial projections for Anderson's regions for 2004. Judish Decl., Ex. A at 0090-91. Sotheby's estimated a net 2004 year-end profit of $1,853,000 for Anderson's regions. *Id.* Had Anderson worked for Sotheby's for the entire year, and the actual profits had matched the projections, Anderson's bonus would have been 36.3% of that profit, or $672,639. Pro-rated for the 48 days that Anderson worked for Sotheby's between January 1, 2004 and February 17, 2004, Anderson's bonus would equal $88,457. Stmt. ¶ 50. This would be consistent with the pro-rated value of Anderson's

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"It is well established under New York law that '[a]n employee's entitlement to a bonus is governed by the terms of the employer's bonus plan.'" *O'Dell v. Trans World Entm't Corp.*, 153 F.Supp. 2d 378, 397 (S.D.N.Y. 2001) (quoting *Hall v. United Parcel Serv. of Am., Inc.,* 76 N.Y.2d 27, 36 (1990)). Anderson concedes that there is no written bonus plan guaranteeing him a 2004 bonus from Sotheby's. Pl.'s Mem. at 22; *see also* Stmt. ¶ 48.

In any event, a bonus qualifies as "wages" under Section 190 of the New York Labor Law only after it is "actually earned and vested." *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 264 (2d Cir. 1999). When an employee separates from service before a bonus vests, the employer is not obligated under the Labor Law to pay that bonus. *Id.*; *Truelove v. N.E. Capital & Advisory, Inc.*, 95 N.Y.S.2d 220, 225 (App. Div. 2000). The annual bonus that Anderson received from Sotheby's in previous years was based on the yearly profit of his regions, Stmt. ¶ 49, and could only vest at year-end, when the regions' total revenues and expenses were finalized. *See Dean Witter Reynolds Inc. v. Ross*, 75 A.D.2d 373, 381-82 (N.Y. Sup. Ct. 1980) (holding that bonus based on profits did not vest "until the end of the production period, when all appropriate adjustments were made in conformity with the [bonus plan]"). Anderson's bonus did not vest because his Sotheby's employment terminated only six weeks into the year 2004.

Anderson is similarly not entitled to recover for breach of contract. Anderson asserts that he and Siegel agreed to 2004 compensation under the same formula as Anderson's prior Sotheby's compensation agreements. Pl.'s Mem. at 22. These agreements, however, based Anderson's bonus on the end-of-year profit for his regions. Stmt. ¶ 49. Thus, a condition prece-

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2002 and 2003 bonuses. Stmt. ¶¶ 51-52. Pro-rating for 48 days of employment, Anderson's 2003 bonus would have been $86,270, and Anderson's 2002 bonus would have been $84,614. *Id.*

dent to Anderson receiving a bonus was employment with Sotheby's until year-end. The condition precedent to Anderson's right to a contractual bonus never occurred.

Because Anderson asserts that Sotheby's contracted to pay him a 2004 bonus, he may not seek recovery under the equitable theory of quantum meruit. "[W]here there is an express contract, no recovery can be had on a theory of implied contract." *Criscuolo v. Joseph E. Seagram & Sons, Inc.*, No. 02 Civ. 1302 (GEL), 2003 WL 22415753, at *11 (S.D.N.Y. Oct. 31, 2003) (denying recovery under quantum meruit theory). Even absent a contractual agreement, quantum meruit does not entitle Anderson to recovery of a bonus predicated on full-year 2004 profits based on the six-week results of his Sotheby's regions.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for summary judgment and deny Anderson's cross-motion for summary judgment.

Respectfully submitted,

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